

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation
of the

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

v.

WILLIAM H. NULTON, JR., aka BEAU
NULTON, an Individual,

Respondent.

KIM NEUFELD,

Complainant.

Case Nos.

E 200102 L-0461-03-s

C 02-03-050

03-10-P

DECISION

The Fair Employment and Housing Commission hereby adopts the attached Proposed Decision as the Commission's final decision in this matter and designates it precedential pursuant to Government Code section 12935, subdivision (h), and California Code of Regulations, title 2, section 7435, subdivision (a).

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5, and California Code of Regulations, title 2, section 7437. Any petition for judicial review and related papers shall be served on the Department, the Commission, respondent, and complainants.

DATED: September 16, 2003

GEORGE WOOLVERTON

HERSCHEL ROSENTHAL

LISA DUARTE

JOSEPH JULIAN

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PROPOSED DECISION

Hearing Officer Caroline L. Hunt heard this matter on behalf of the Fair Employment and Housing Commission on May 19, 2003, in San Luis Obispo, California. Julie Johnson, Staff Counsel, represented the Department of Fair Employment and Housing. Complainant Kim Neufeld and respondent William Nulton attended the hearing.

The Fair Employment and Housing Commission (Commission) received the hearing transcript and the case was submitted on June 9, 2003.

After consideration of the entire record, the Hearing Officer makes the following findings of fact, determination of issues, and order.

FINDINGS OF FACT

1. On March 5, 2002, Kimberly Lynn Freitas, then known as Kim Neufeld, (complainant) filed written, verified complaints with the Department of Fair Employment and Housing (Department) against Z-Club, Larry Gin, Christie Hudson and Beau Nulton. The complaints alleged that in the preceding year she had been subjected to physical and verbal

sexual harassment constituting a hostile work environment and was terminated in retaliation for complaining about the sexual harassment.

2. The Department is an administrative agency empowered to issue accusations under Government Code section 12930, subdivision (h). On March 4, 2003, Dennis W. Hayashi, in his then official capacity as Director of the Department, issued an accusation against Gin Construction, Inc., a California corporation, dba Z-Club of San Luis Obispo (Z-Club), Larry D. Gin, individually and as a managing agent, Christie Hudson, individually and as a managing agent, and Beau Nulton, as an individual.

3. The Department's accusation alleged that throughout complainant's employment at Z-Club, Beau Nulton, Z-Club's promotions manager, unlawfully sexually harassed complainant by subjecting her to physical and verbal harassment in the workplace because of her sex, thereby creating a "hostile, intimidating, offensive and toxic work environment" for complainant, in violation of Government Code section 12940, subdivision (j). The Department also alleged that complainant was subjected to disparate treatment on the basis of her sex, in violation of Government Code section 12940, subdivision (a), and was terminated because she complained about Nulton's unlawful conduct, in violation of Government Code section 12940, subdivision (h). The Department further alleged that respondents failed to take immediate and corrective action to prevent the harassment from occurring, in violation of Government Code section 12940, subdivision (k), and that Z-Club failed to inform its employees of their rights to be free of sexual harassment, in violation of Government Code section 12950.

4. On March 18, 2003, the Department served the accusation and related papers on the named respondents. On or about March 25, 2003, "all respondents except Beau Nulton" elected to transfer the matter to civil court pursuant to Government Code section 12965, subdivision (c)(1). The Department subsequently dismissed the accusation against Gin Construction, Inc., Larry D. Gin and Christie Hudson, and filed a civil complaint against them on April 21, 2003, in the Superior Court of the County of San Luis Obispo, case number CV 030385. That civil action was pending at the time of the hearing before the Commission.

5. At all relevant times, respondent William H. Nulton, Jr., aka Beau Nulton (Nulton or respondent Nulton) was employed at Z-Club, a bar located in San Luis Obispo, California. Nulton is a "person" and an "employee" within the meaning of Government Code section 12940, subdivisions (j)(1) and (j)(3).

6. Prior to May 2001, complainant worked at Tahoe Joe's, where she first met Nulton. Nulton was attracted to complainant and interested in dating her. One day at Tahoe Joe's, he gave her his business card, and hand-wrote on it:

Call me if you ever give up on Mark and want a serious relationship (Ha! Ha! Just kidding). Call me for Mad Passionate Night. OK Just call me.

7. In May 2001, complainant began working as a daytime bartender at Z-Club. Nulton worked nights at Z-Club as a disc jockey and karaoke host. Christie Hudson was the bar manager and complainant's direct supervisor.

8. When complainant first started at Z-Club, the bar held "dirty dancing" contests during the evenings. In the course of the contests, some of the patrons removed items of their underwear, which were placed around the disc jockey booth located at the end of the bar. The items of underwear were left there overnight. Complainant was offended when she got to work the next day and found underwear hanging at the bar.

9. During the first few months of complainant's employment, Nulton made several romantic overtures to complainant. In about June 2001 he wrote her a letter, telling her that he thought she was beautiful, that he had strong feelings for her and that he would like a relationship with her. At some point he wrote complainant a second letter, leaving it in her tip jar. Complainant was not interested in a romantic relationship with Nulton and wanted only to be friends. During this period, complainant and Nulton had a friendly working relationship, with some teasing and jokes.

10. On July 4, 2001, complainant was tending bar at Z-Club. Nulton arrived at Z-Club after drinking tequila while out with his friends. Complainant decided Nulton had had enough to drink because he was acting "obnoxious," throwing bar stools around and swearing. She refused to serve him any more alcohol. Nulton started cursing and screaming vulgarities at complainant, calling her, among other things, "fucking bitch." He grabbed a blown-up balloon in the shape of a large Corona beer bottle and threw it, hitting a mirror behind the bar and breaking the glass. Complainant felt threatened and frightened by Nulton's outburst.

11. Complainant told her supervisor Christie Hudson about the July 4th incident, complaining about Nulton's conduct. Following her complaint to Hudson, complainant's and Nulton's working relationship deteriorated. Nulton was no longer interested in complainant romantically. He became critical of her personality and work habits.

12. In about August 2001, Nulton became Z-Club's promotions manager, in addition to disc jockey and karaoke host. Nulton was frequently in the bar when complainant worked during the day, as well as in the evenings.

13. Following her complaint about the July 4th incident, until the termination of complainant's employment on January 21, 2002, Nulton engaged in the following conduct toward complainant in the workplace:

- a. Nulton frequently referred to complainant as "fucking bitch." He called her "fucking bitch" between three and four times a week and at other times, less frequently, called her "bitch" and "stupid." On one occasion, Nulton also called complainant "cunt"

(referred to at hearing as “the c-word”). Complainant was offended and insulted by respondent Nulton’s language toward her.

b. Nulton referred to complainant’s body and appearance in a derogatory manner by regularly—two to three times a week—calling her “NOTNA” in front of customers and his friends in the bar. At first complainant had no idea what “NOTNA” meant, but then learned from one of Nulton’s friends that the phrase stood for “no tits, no ass.” Complainant was offended by Nulton’s repeatedly calling her “NOTNA.” Some of her customers—friends of Nulton—also used the term “NOTNA” to refer to complainant, which further offended her.

c. Complainant was unhappy about the way Nulton treated her and referred to her, finding it offensive and vulgar. She complained to him about it, telling him that he needed to treat people how he would like to be treated. She also complained to bar manager Christie Hudson. However, her complaints were to no avail, as Nulton continued to call complainant “fucking bitch” and “NOTNA” at work on a regular basis.

d. Nulton came into the Z-Club three to four times a week when he was not scheduled to work that day. He frequently stood at the end of the bar and stared at complainant. His continuous staring made complainant very uneasy. She told her friend, Shani Price, how uncomfortable she was around Nulton. He at times acted angry and “barked” orders at complainant—on one occasion demanding that she make coffee for him by calling from his cell phone while he stood at the end of the bar. Complainant complained about Nulton’s conduct to bar manager Christie Hudson, but Nulton’s staring at complainant while she worked persisted.

e. Complainant, like other bar employees at Z-Club, wore a uniform consisting of a pair of shorts or slacks and a shirt. On a number of occasions, Nulton criticized complainant’s clothing, saying her clothes were too tight or that her shorts were not tight enough. Complainant was surprised and discomfited by respondent’s comments and criticisms of her clothing. In addition, on several occasions, respondent mocked how complainant walked. After Nulton met her mother, he told complainant that he knew where she got her walk from because her mother “walks the same way...like a flamingo.”

14. After her complaints about Nulton’s conduct had no effect, complainant went to bar owner Larry Gin. She asked for a meeting to address Nulton’s behavior toward her. That meeting led to a brief respite, but shortly thereafter, Nulton’s mocking conduct and verbal attacks on complainant resumed. Nulton also persisted in staring at complainant from one end of the bar as she worked, to her ongoing discomfort.

15. At times, complainant called Nulton “grumpy butt.”

16. Complainant’s friend Shawna Cagle frequented Z-Club at least twice a week throughout complainant’s employment there. Cagle overheard respondent Nulton call

complainant “bitch,” “stupid,” and “NOTNA” and also heard complainant tell Christie Hudson that complainant was uncomfortable with Nulton’s conduct.

17. As a result of respondent’s conduct toward her, complainant was distressed and unhappy at work. She was anxious and had trouble sleeping. She cried frequently and was fearful of losing her job, as she saw that respondent Nulton was friendly with bar owner Larry Gin, and thought that her complaints about respondent’s conduct would get her fired. Complainant was the single parent of a young son, and worried that she needed her job to support them both. She regularly recounted her concerns about her job and her discomfort and unhappiness at Nulton’s conduct to her friends, including Shani Price and Shawna Cagle.

18. On January 21, 2002, bar manager Christie Hudson telephoned complainant at home, telling her that she was terminated from her job. Complainant became distraught and “hysterical” upon learning she had been fired, believing that respondent Nulton was behind it.

19. After losing her job at Z-Club, complainant moved to Bakersfield and at time of hearing, still lived there, working as the manager of a sports bar.

20. At the time of hearing, respondent Nulton no longer worked at Z-Club.

DETERMINATION OF ISSUES

Liability

A. Sexual Harassment

The Department alleges that respondent Nulton sexually harassed complainant, in violation of Government Code section 12940, subdivision (j).¹ The Department may establish a violation under subdivision (j) by proving that respondent engaged in harassment based on complainant’s sex and that the harassment created a hostile or abusive work environment, regardless of whether the complainant suffered tangible or economic loss such as a promotion, pay increase, or the job itself. (Gov. Code, § 12940, subd. (j)(1); *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 516-517; *Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409, 1413-1414; *Fisher v. San Pedro Peninsula Hospital* (1989) 214

¹ At hearing, the Department dismissed allegations in the accusation regarding Gin Construction, Inc., Larry D. Gin, and Christie Hudson, on the basis that they elected to transfer the matter to court. (Gov. Code §12965, subd. (c)(1).) The Hearing Officer took official notice of the Department’s filing of the complaint in the Superior Court of the County of San Luis Obispo, case number CV 030385. (Cal. Code Regs., tit. 2, §7431.) At hearing, the Department dismissed allegations that respondents violated Government Code sections 12940, subdivisions (a) and (k), and 12950. The Department proceeded on the remaining allegations that Nulton allegedly sexually harassed and retaliated against complainant in violation of Government Code section 12940, subdivisions (h) and (j).

1. Whether Unwanted Sexual Conduct Occurred

Complainant testified that Nulton engaged in recurrent instances of unwelcome sexual conduct toward her in the workplace. She testified that Nulton repeatedly called her “fucking bitch” and “NOTNA,” meaning “no tits, no ass.” Complainant also testified that Nulton also called her “bitch” and “the c-word.” The Department argues that Nulton engaged in those repeated verbal acts of sexually harassing conduct toward complainant after she rejected his advances and then complained about him to their supervisors.

Respondent Nulton denied calling complainant “bitch” more than once. He also denied ever using the word “cunt” to refer to her. He acknowledged calling complainant “NOTNA” but, according to respondent, this was part of their mutual “banter.” Nulton contended that their relationship changed because he discovered that he did not like complainant’s personality and, in response to the testimony that he stared at her continually from the end of the bar, Nulton asserted that he watched complainant while she worked to ensure she performed her duties properly.²

Complainant’s testimony is credited over Nulton’s version of events for the following reasons. First, there were a number of inconsistencies in respondent’s testimony. For example, when asked by the Department if he had taken photographs of women’s breasts in the bar, he testified that he “never had a camera in [his] hand.” Nulton later in his testimony admitted that he had taken a photograph of Shawna Cagle’s chest and cleavage and displayed the photograph at the bar. Respondent also testified that he had never broken anything in the bar, yet later acknowledged the July 4th incident where he threw a balloon beer bottle, breaking a mirror behind the bar. In contrast, complainant’s testimony was consistent throughout. Second, contrary to respondent’s characterization of his interactions with complainant as mutual “banter,” he acknowledged that complainant told him that she was uncomfortable with his conduct, and that she had asked him to stop. This is consistent with complainant’s testimony that she had tried direct appeals to Nulton and to her supervisors in efforts to get his behavior stopped. Third, complainant’s testimony was corroborated in significant part by the Department’s witnesses Shawna Cagle and Shani Price, both of whom presented as forthright and credible witnesses. They, like complainant, did not embellish their accounts, nor exaggerate their observations or testimony. They each testified to having observed complainant’s continuing discomfort due to respondent’s conduct toward her at work.

² The parties dispute whether Nulton, after he was promoted to the position of “promotions manager,” acted as complainant’s supervisor. (Gov. Code, § 12926, subd. (r).) It is not necessary to reach that issue in this proceeding, however, since the Department asserts that Nulton is liable as an “employee” for his own acts of alleged sexual harassment under Government Code section 12940, subdivisions (j)(1) and (j)(3).

The evidence established that complainant and Nulton began their working relationship on cordial, even friendly, terms. Even before complainant began working at Z-Club, Nulton was attracted to her and interested in a closer relationship. Once, however, complainant rejected Nulton's advances, then complained about him to the bar manager and owner, Nulton's behavior toward complainant changed from sexual admiration to active hostility.

The nature of the verbal conduct that Nulton directed at complainant on and after July 4, 2001, the use of the words "fucking bitch," and "cunt"—are inherently gender-specific, sexual references. (See *Steiner v. Showboat Operating Co.* (9th Cir. 1994) 25 F.3d 1459, 1462-1463, cert. den. (1995) 513 U.S. 1082 [use of terms "fucking dumb broads" and "fucking cunts" relied on "sexual epithets, offensive explicit references to women's bodies and sexual conduct"]; *Jenson v. Eveleth Taconite Co.* (D. Minn. 1993) 824 F.Supp. 847, 883, citing *Katz v. Dole* (4th Cir. 1983) 709 F.2d 251, 254 [such terms are "intensely degrading" to women];³ *Dept. Fair Empl. & Hous. v. Lake County Dept. of Health Services* (July 22, 1998) No. 98-11, FEHC Precedential Decs. 1998, CEB 1 [1998 WL 750899 (Cal.F.E.H.C.)] [use of "sexually derogatory language," including "bitch," constitutes sexually harassing conduct] disapproved on other grounds by *Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, superseded by Stats. 1993, ch. 711, §2.) While the term "NOTNA" is ambiguous, when viewed in the context presented here, it was an acronym critical of the female body, referring to complainant's supposed lack of "tits" and "ass." Thus "NOTNA," as used by Nulton, was a gender-specific, sexualized insult to women, and to complainant in particular.⁴

Complainant testified that Nulton repeatedly stared at her from the end of the bar, to her continuing discomfort. Complainant further testified that Nulton also criticized her dress, and made fun of the way she walked. When he met her mother, Nulton told complainant that her mother walked "the same way, like a flamingo." On occasion, he called her "stupid." Acts that can rise to the level of sexual harassment do "not necessarily involve sexual conduct [and] need not have anything to do with lewd acts, double entendres or sexual advances. Sexual harassment may involve conduct, whether blatant or subtle, that discriminates against a person solely because of that person's sex." (*Accardi v. Sup. Court* (1993) 17 Cal.App.4th 341, 345; *Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal.App.4th 994, 1001.) Under this standard, the evidence established that Nulton's taunting of complainant's walk, his criticisms of her clothing as too tight or too loose, and his constant staring at her, after she rejected his advances, constituted unwanted conduct directed at complainant based on her sex.

³ Although FEHA and federal anti-discrimination laws differ in important respects, federal authorities can be considered in interpreting analogous provisions of FEHA where their objectives are identical. (*Fisher v. San Pedro Peninsula Hospital*, *supra*, 214 Cal.App.3d at p. 606.)

⁴ That complainant admitted on occasion calling Nulton "grumpy butt" neither neutralizes the sexual hostility of Nulton's invective nor renders it mutual "banter."

Complainant credibly testified that she was uncomfortable at Nulton's language toward her, his criticisms of her body and clothing, and his staring at her. His outburst on July 4th, when he threw an object at a mirror, and cursed at complainant for declining to serve him alcohol, made complainant feel threatened and afraid. She testified, and Nulton acknowledged, that she complained about his treatment of her on a regular basis, with direct appeals to him, and complaints to her supervisors. This testimony, together with the corroborating testimony of Shawna Cagle and Shani Price, establish that Nulton's conduct was manifestly unwelcome to complainant.

Accordingly, the Department has proven that complainant was subjected to unwelcome sexual conduct, including unwanted conduct based on her sex, by respondent Nulton, as credibly testified to by complainant and described in the Findings of Fact.

2. Hostile Work Environment

Complainant, like all employees, is entitled to the benefit of a "discrimination-free workplace," a work environment free of harassment. (Cal. Code of Regs., tit. 2, §§7286.5, subds. (f), and (f)(3), and 7287.6, subd. (b); *Dept. Fair Empl. & Hous. v. Jarvis*, *supra*, 2001 CEB 1, at p. 7; see also *Harris v. Forklift Sys., Inc.* 510 U.S. 17, 21-22; *Meritor Sav. Bank, FSB v. Vinson* (1986) 477 U.S. 57, 65; *Birschtein v. New United Motor Manufacturing*, *supra*, 92 Cal.App.4th at p. 1000; *Sheffield v. Los Angeles County Dept. of Social Services* (2003) 109 Cal.App.4th 153, 161-162 [employees' entitlement to a workplace free from "discriminatory intimidation, ridicule, and insult"].)

In cases alleging hostile work environment sexual harassment, the Department must establish that the unwelcome conduct is sufficiently severe or pervasive to alter the conditions of the complainant's employment and create an intimidating, oppressive, hostile, abusive or offensive work environment, or otherwise interfere with her emotional well-being or ability to perform her work. (*Birschtein v. New United Motor Manufacturing*, *supra*, 92 Cal.App.4th at p. 1000; [*Beyda v. City of Los Angeles*, *supra*, 65 Cal.App.4th at pp. 516-520](#); *Fisher v. San Pedro Peninsula Hospital*, *supra*, 214 Cal.App.3d at p. 608; *Dept. Fair Empl. & Hous. v. Jarvis*, *supra*, 2001 CEB 1, at p. 10.) The "harassment need not be severe *and* pervasive in order to impose liability; either severe *or* pervasive will suffice." (*Sheffield v. Los Angeles County Dept. of Social Services*, *supra*, 109 Cal.App.4th at p. 162 [citing *Hostetler v. Quality Dining, Inc.* (7th Cir. 2000) 218 F.3d 798, 808].) The objective severity of the harassment is judged from the perspective of a reasonable person in the complainant's position, considering all of the circumstances, and is guided by common sense and sensitivity to social context. ([*Beyda v. City of Los Angeles*, *supra*, 65 Cal.App.4th at p. 517](#), citing *Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75, 81; *Dept. Fair Empl. & Hous. v. Lactalis USA, Inc.* (Nov. 4, 2002) No. 02-15-P, at p. 10 [2002 WL 31520127] (Cal. F.E.H.C.); *Dept. Fair Empl. & Hous. v. Jarvis*, *supra*, 2001, CEB 1, at p. 10.)

Complainant credibly testified that Nulton directed demeaning gender-specific insults to her on a regular basis from July 4, 2001, through January 21, 2002. For a period of over six months, complainant was subjected to a constant barrage of sexual vulgarities and taunting, with Nulton's regularly calling her "fucking bitch," and "NOTNA." Complainant

credibly testified that Nulton called her “fucking bitch” three to four times a week, and “NOTNA” between two and three times a week. Moreover, Nulton’s repeated staring at complainant—according to witness Shani Price, in an “angry” way—was intimidating to complainant, making complainant uncomfortable and upset in the workplace. (See *Birschtein v. New United Motor Manufacturing*, *supra*, 92 Cal.App.4th at p. 1002 [co-worker’s threatening staring as a result of complaints about sexual harassment may constitute “retaliatory acts...sufficiently allied with prior acts of harassment to constitute a continuing course of unlawful conduct.”]) This conduct took place in a context where Nulton had previously become physical—throwing an object, breaking a mirror in the bar—making complainant feel threatened. (See *Sheffield v. Los Angeles County Dept. of Social Services*, *supra*, 109 Cal.App.4th at pp. 163-164 [“aspect of violence” such as slamming a fist into palm could result in workplace being “drastically changed” for hostile environment analysis].) Nulton’s repeated pejorative sex-specific insults and vulgarities, together with his criticisms of complainant’s body, her clothing and her walk, constituted a concerted pattern of continuing abusive conduct toward complainant. These acts, looked at as a whole, were pervasive, in that they consisted of repeated and unremitting sexual epithets and harassing conduct toward complainant that made her work environment uncertain and uncomfortable, leaving her frequently crying and anxious. Moreover, respondent’s use of the sexual invective “fucking bitch” to complainant on a frequent basis, and his calling her the unquestionably offensive term “cunt” on one occasion, were also severe, within the meaning of the Act, given these sex-based terms’ inherently degrading and demeaning nature.

Accordingly, the Department established that respondent Nulton subjected complainant to sexual harassment in violation of the Act. (Gov. Code, §12940, subd. (j).) Respondent Nulton is personally liable for sexually harassing complainant, pursuant to Government Code section 12940, subdivision (j)(3).

B. Retaliation

The Department also alleges that respondent Nulton violated Government Code section 12940, subdivision (h), asserting that the termination of complainant’s employment was in retaliation for her complaints about Nulton’s sexually harassing conduct. Government Code section 12940, subdivision (h), provides that it is unlawful for any person to discharge or otherwise discriminate against a person because that person has opposed an unlawful employment practice, filed a complaint, or assisted in a proceeding under the Act. Retaliation is established if a preponderance of the evidence demonstrates a causal connection between complainant’s complaining about respondent’s sexual harassment and an adverse employment action against her. (*Dept. Fair Empl. & Hous. v. Globe Battery* (1987) No. 87-19, FEHC Precedential Decs. 1986-87, CEB 9, p. 8, *affd. Johnson Controls, Inc. v. Fair Employment & Housing Com.* (1990) 218 Cal.App.3d 517.)

On this record, there was insufficient evidence to establish whether the decision makers, Larry Gin and/or Christie Hudson,⁵ discharged complainant because of her complaints about Nulton. Nor was there sufficient evidence to find that Nulton played any role in the decision-making process that led to complainant's firing.

Thus, the Department did not establish that respondent Nulton violated Government Code section 12940, subdivision (h).

Remedies

A. Make-Whole Relief

Having established that respondent sexually harassed complainant in violation of the Act, the Department is entitled to an order of whatever forms of relief are necessary to make complainant whole for any loss or injury she suffered as a result of such harassment. The Department must demonstrate the nature and extent of the resultant injury, and respondent must demonstrate any bar or excuse he asserts to any part of these remedies. (Gov. Code, §12970, subd. (a); Cal. Code Regs., tit. 2, §7286.9; *Dept. Fair Empl. & Hous. v. Madera County* (Apr. 26, 1990) No. 90-03, FEHC Precedential Decs. 1990-91, CEB 1 at p. 34 [1990 WL 312871 (Cal.F.E.H.C.)].)

The Department's accusation requested an award of complainant's lost wages, out-of-pocket damages, compensatory damages for emotional distress, an administrative fine, and affirmative relief.

1. Back Pay

Having found that respondent Nulton is not liable for complainant's termination of employment, he is not responsible for any loss of wages sustained by complainant. Thus, no back pay is awarded.

2. Out-of-Pocket Damages

The Department did not establish any of complainant's expenses attributable to respondent Nulton. No damages will be ordered for out-of-pocket losses.

3. Damages for Emotional Distress

The Commission has the authority to award actual damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary

⁵ Neither Larry Gin nor Christie Hudson testified at hearing. Whether their decision to terminate complainant's employment was retaliatory is not at issue in this proceeding, but is pending in the Department's action before the Superior Court of the County of San Luis Obispo.

losses in an amount not to exceed, in combination with any administrative fines imposed, \$150,000 per aggrieved person per respondent. (Gov. Code, §12970, subd. (a) (3).) In determining whether to award damages for emotional injuries, and the amount of any award for these damages, the Commission considers relevant evidence of the effects of discrimination on the aggrieved person with respect to: physical and mental well-being; personal integrity, dignity, and privacy; ability to work, earn a living, and advance in his or her career; personal and professional reputation; family relationships; and, access to the job and ability to associate with peers and coworkers. The duration of the injury and the egregiousness of the discriminatory practice are also factors to be considered. (Gov. Code, §12970, subd. (b); *Dept. Fair Empl. & Hous. v. Aluminum Precision Products, Inc.* (1988) No. 88-05, FEHC Precedential Decs. 1988-1989, CEB 4, pp. 10-14.)

The evidence established that respondent's unlawful conduct toward complainant, over a period of six months, made her frequently distressed, anxious, and unhappy at work. She at times cried and had trouble sleeping, worrying about her job and need to support herself and her son. Complainant's emotional distress resulting from respondent's conduct was evidenced by her own credible testimony, and that of her friends, Shani Price and Shawna Cagle, in whom complainant confided. Both Price and Cagle testified to complainant's continuing upset and distress as a result of respondent's sexually harassing conduct.

Considering the facts and testimony elicited here in light of the factors set forth in Government Code section 12970, respondent will be ordered to pay complainant \$15,000 in damages for her emotional distress. Interest will accrue on this amount, at the rate of ten percent per year from the effective date of this decision until the date of payment. (Code Civ. Proc., §685.010.)

B. Administrative Fine

The Department also seeks an order awarding an administrative fine against respondent Nulton to vindicate the purpose and policy of the Act.

The Commission has the authority to order administrative fines pursuant to the Act where it finds, by clear and convincing evidence, a respondent "has been guilty of oppression, fraud, or malice, expressed or implied, as required by section 3294 of the Civil Code." (Gov. Code §12970, subd. (d).)

Here the Department established, by clear and convincing evidence, that respondent Nulton's behavior toward complainant was not only unlawful, but was also vindictive, malicious and oppressive. He repeatedly subjected complainant to sexually harassing verbal abuse, notwithstanding her complaints and direct requests to him to stop. This continuing course of unlawful conduct in violation of the Act warrants an administrative fine in the amount of \$5000, payable to the state's General Fund. (Civ. Code §3294; Gov. Code

§12970, subd. (d).) Interest will accrue on this amount at the rate of ten percent per year, from the effective date of this decision until the date of payment.

Accordingly, this decision orders an administrative fine against respondent Nulton in the amount of \$5000.

C. Affirmative Relief

The Department's accusation seeks a cease and desist order enjoining respondent Nulton from engaging in further acts of sexual harassment. Such an order is appropriate under Government Code section 12970, subdivision (a).

Moreover, training in sexual harassment prevention shall be ordered for respondent Nulton. Training is particularly appropriate here as a form of affirmative relief to prevent the recurrence of sexual harassment. (Gov. Code §12970, subd. (a)(5).)

ORDER

1. Respondent William H. Nulton, Jr., shall immediately cease and desist from harassment based on sex.

2. Within 60 days of the effective date of this decision, respondent William H. Nulton, Jr., shall pay to complainant Kimberly Freitas, formerly Kim Neufeld, actual damages for emotional distress in the amount of \$15,000, together with interest on this amount at the rate of ten percent per year, accruing from the effective date of this decision to the date of payment.

3. Within 60 days of the effective date of this decision, respondent William H. Nulton, Jr., shall pay to the state's General Fund an administrative fine in the amount of \$5,000, together with interest on this amount at the rate of ten percent per year, accruing from the effective date of this decision to the date of payment.

4. Within 60 days after the effective date of this decision, respondent William H. Nulton, Jr., shall attend a training program about prohibited sexual harassment and the procedures and remedies available under California law. Respondent William H. Nulton, Jr., shall secure advance approval from the Department of Fair Employment and Housing of the sexual harassment training provider, and the form and content of the training and shall provide written certification of his completion of the training to the Department and Commission.

5. Within 100 days after the effective date of this decision, respondent William H. Nulton, Jr., shall in writing notify the Department and the Commission of the

nature of his compliance with this order. Respondent shall also notify the Department and Commission of any change of address and telephone number.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5 and California Code of Regulations, title 2, section 7437. Any petition for judicial review and related papers should be served on the Department, Commission, respondent and complainant.

DATED: August 8, 2003

CAROLINE L. HUNT
Hearing Officer